

91-823

(1)

Supreme Court, U.S.

FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY HOLLEY,
Petitioner

Versus

RONALD SCHREIBECK AND
CITY OF ALLENTOWN,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED
STATES

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QUESTION PRESENTED FOR REVIEW

- I. WHETHER OR NOT AN AMENDED COMPLAINT WHICH ALLEGES THAT A WHITE POLICE OFFICER TOLD WHITE FEMALES TO STAY AWAY FROM PLAINTIFF, A BLACK MALE, BECAUSE HE WAS A PIMP OUT OF RACIAL ANIMOSITY TOWARDS THE PLAINTIFF STATES A CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT IN THAT THE CONDUCT OF THE OFFICER VIOLATES THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT?



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IN THE SUPREME COURT OF
THE UNITED STATES

NO.

HENRY HOLLEY,
Petitioner

v.

RONALD SCHREIBECK AND
CITY OF ALLENTOWN
Respondent

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Henry Holley, prays that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

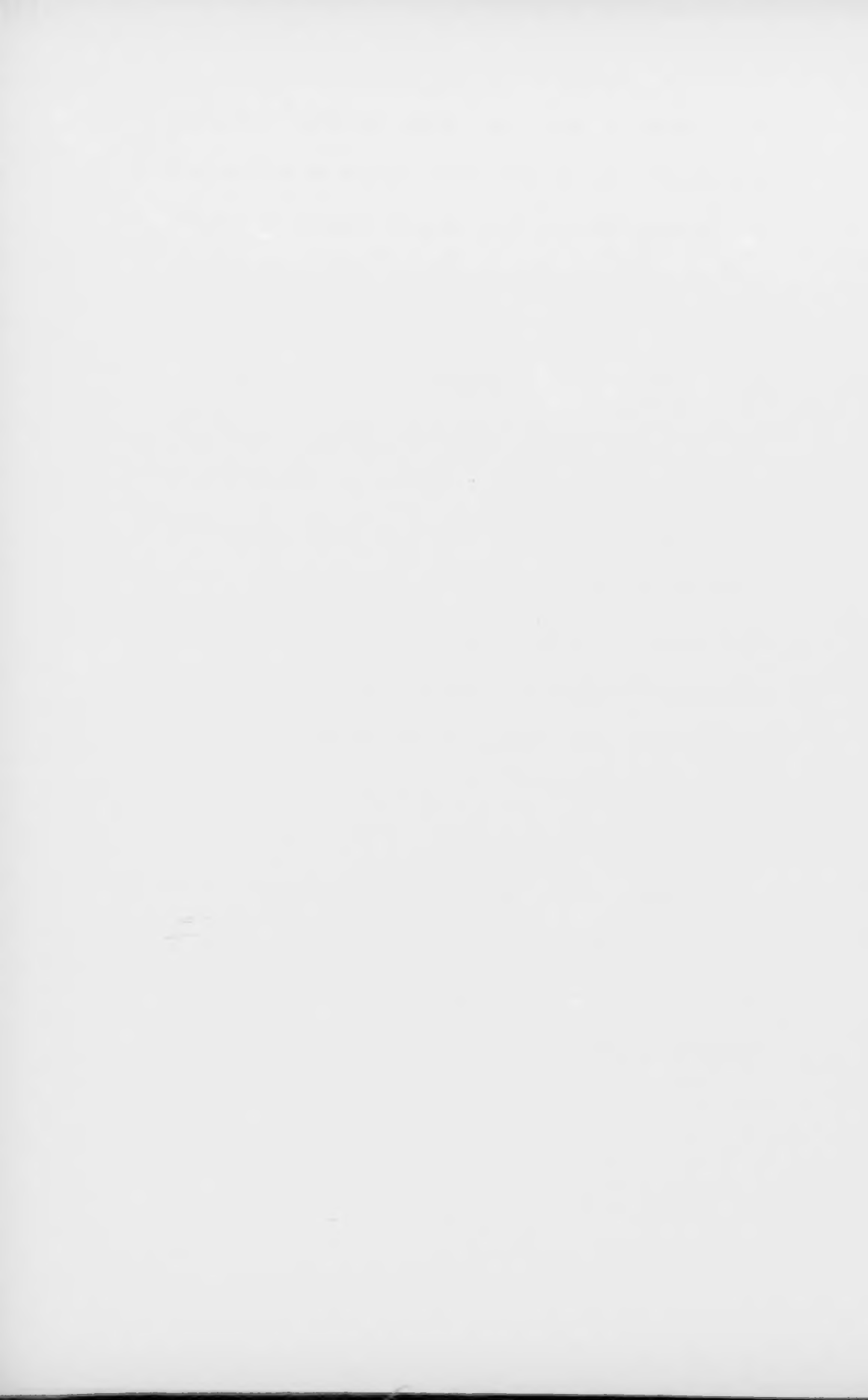
The Order of the United States Court of Appeals for the Third Circuit rendered August 21, 1991 is unrecorded and appears at Appendix A Page 20.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered March 1, 1991 is unrecorded and appears at Appendix B Page 24.

The final Order of the United States Court of Appeals for the Third Circuit is dated August 21, 1991 and this Petition for Writ of Certiorari is timely filed, written ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254 (1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

42 U.S.C. §1983 at Appendix C Page 43. Fourteenth Amendment of United States Constitution at Appendix D Page 44.

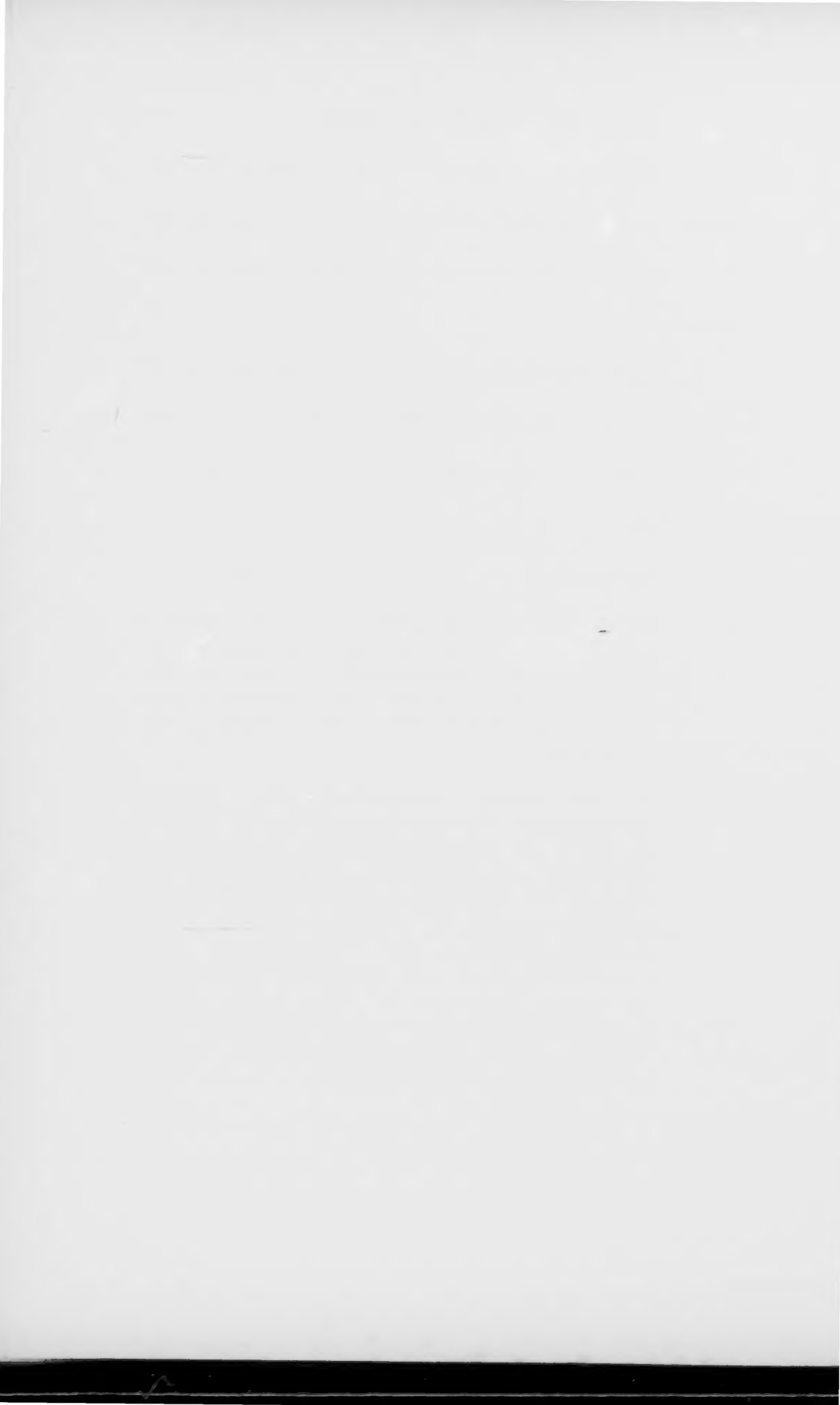


STATEMENT OF CASE

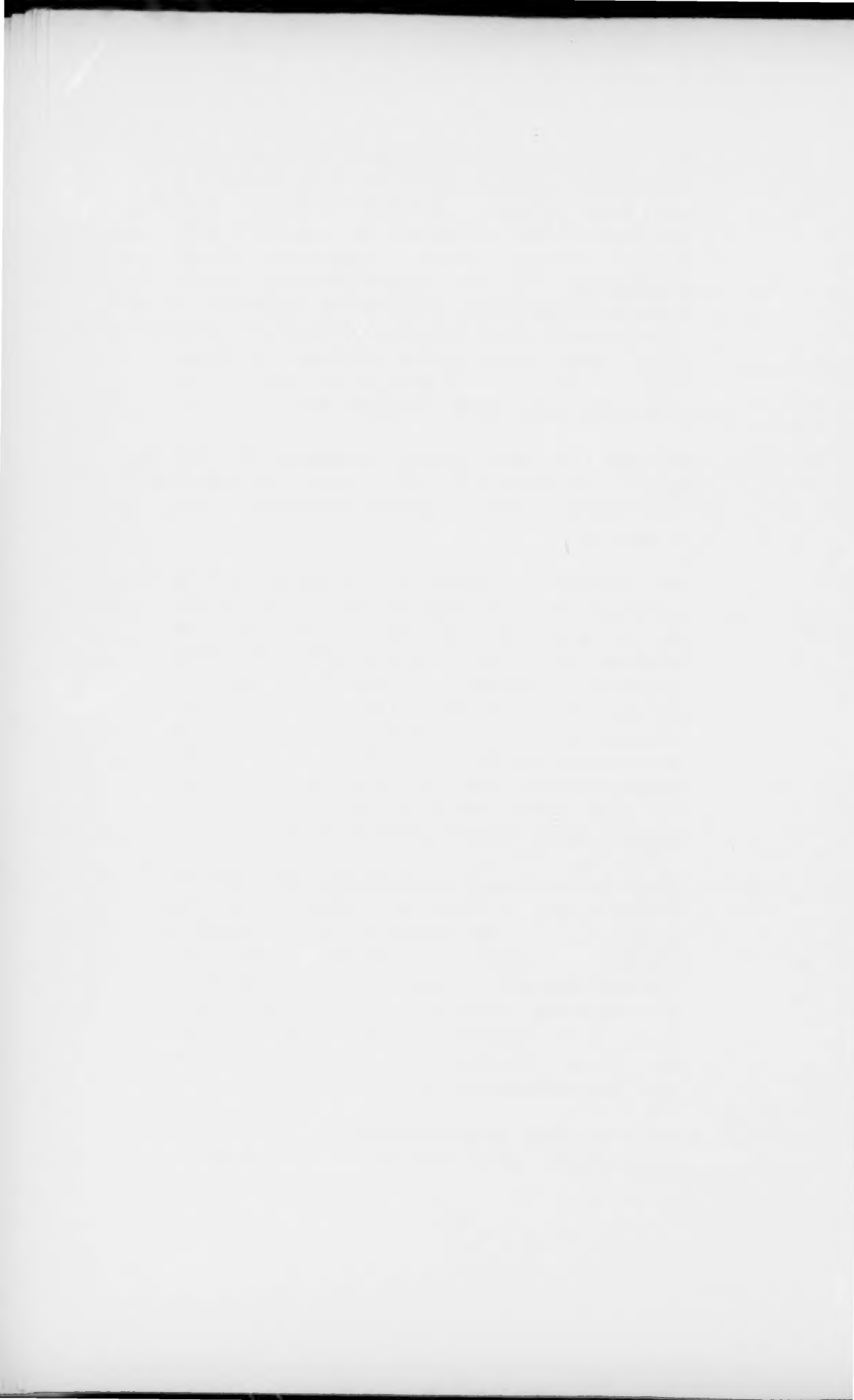
This is an appeal from dismissal of Petitioner/Appellant's Amended Complaint for failure to state a Federal cause of actions.

Appellant's Federal claims are set forth in Counts One and Two of Appellant's Amended Complaint which follows:

- "6. Plaintiff is a black adult male.
7. Prior to December 30, 1989, Defendant occasionally visited some friends who happened to be white females who work at commercial establishments of the City of Allentown.
8. On or about December 30, 1989, Defendant, Ronald Schreibeck, while on duty as a police officer for the City of Allentown, approached a number of Plaintiff's white female friends while at work in commercial establishments in the City of Allentown, and maliciously reported to these friends to stay away from Plaintiff because Plaintiff was a 'pimp' and/or 'involved with prostitution activities.'



9. At the time and place aforesaid, Defendant Schreiberbeck solely because of his race, intentionally and purposefully schemed to inhibit and block these white females from engaging in or associating with black Plaintiff, and told them that 'Defendant and people would believe that they were prostitutes if they had any communication or association with Plaintiff.'
10. Plaintiff has never engaged in or been convicted of any offense relating to prostitution or pimping.
11. Defendant, Ronald Schreiberbeck's conduct as aforesaid, while on duty as a police officer and in the course of his employment whereby acting under lawful police authority from the City of Allentown, violated Plaintiff's constitutional right to free association and to equal protection of the laws solely out of animus based upon Plaintiff's race.
12. As a direct and proximate result of Defendant, Ronald Schreiberbeck's conduct, as aforesaid, Plaintiff's white female friends are so intimidated by Defendant's outrageous conduct that they are afraid to associate with Plaintiff or have ceased all communication and association with Plaintiff.
13. As a direct and proximate result of Defendant Schreiberbeck's outrageous



conduct, Defendant has succeeded in implementing his invidiously discriminatory enforcement of the laws by acting under color of law to use intimidation and other unlawful tactics to alienate, prohibit and inhibit Plaintiff, a black male, from lawful behavior visiting white female friends at commercial establishments while allowing similarly situated white males to visit white females at commercial establishments.

14. As a direct and proximate result of Defendants invidiously discriminatory conduct, Plaintiff suffered loss of friends, companionship and severe mental pain, emotional anguish, distress, humiliation and sleeplessness entitling Plaintiff to damages in excess of Fifty Thousand (\$50,000.00) Dollars.
15. Defendant's aforesaid conduct was outrageous, egregious, intentional, willful and wanton, entitling Plaintiff to punitive damages in excess of Fifty Thousand (\$50,000.00) Dollars.

WHEREFORE, Plaintiff demands judgment against Defendant, Ronald Schreiber, in an amount in excess of Fifty Thousand (\$50,000.00) Dollars, together with costs of suit and reasonable attorney fees.

COUNT TWO

16. At all times herein relevant, Defendant City of Allentown, employed Police Officer Ronald Schreiber, who acted pursuant to government policy implemented, approved, encouraged and/or acquiesced in by Defendant, City of Allentown, relative to the treatment and enforcement of laws against black persons.
17. At all times herein relevant, Defendant, City of Allentown, had actual or constructive knowledge that Police Officer Ronald Schreiber had racist propensities towards black persons and that Police Officer Ronald Schreiber's racist propensities manifested themselves and affected his performance while on duty for and in the course of his employment with Defendant, City of Allentown.
18. At all times herein relevant, despite actual or constructive knowledge of Police Officer Ronald Schreiber's and other Defendant Police Officer's racist propensities toward black persons, Defendant, City of Allentown, failed to discipline and/or reprimand the officers and affirmatively covered up the officers conduct resulting from their racist propensities, thus permitting, aiding, approving and/or acquiescing in Police Officer Ronald Schreiber's conduct



resulting from his racist propensities toward black persons, constituting inter alia a deliberate indifference to the constitutional rights of Plaintiff and others.

19. As a natural, and direct or proximate result of Defendant, Ronald Schreiber's statement, as aforesaid, Plaintiff suffered severe mental pain and emotional anguish, distress, humiliation, and damages to his reputation in excess of Fifty Thousand (\$50,000.00) Dollars.
20. As a direct and proximate result of Defendant City's racist customs, policies and/or deliberately indifferent actions and Defendant, Schreiber's aforesaid conduct in accordance therewith, Plaintiff suffered injuries, damages and constitutional deprivations set forth hereinbefore for which Plaintiff seeks compensation.

WHEREFORE, Plaintiff demands judgment against Defendant, City of Allentown, in an amount in excess of Fifty Thousand (\$50,000.00) Dollars, together with costs of suit."

The District Court, without considering Petitioner's equal protection claim, dismissed Petitioner's



Amended complaint for failure to state a cause of action.

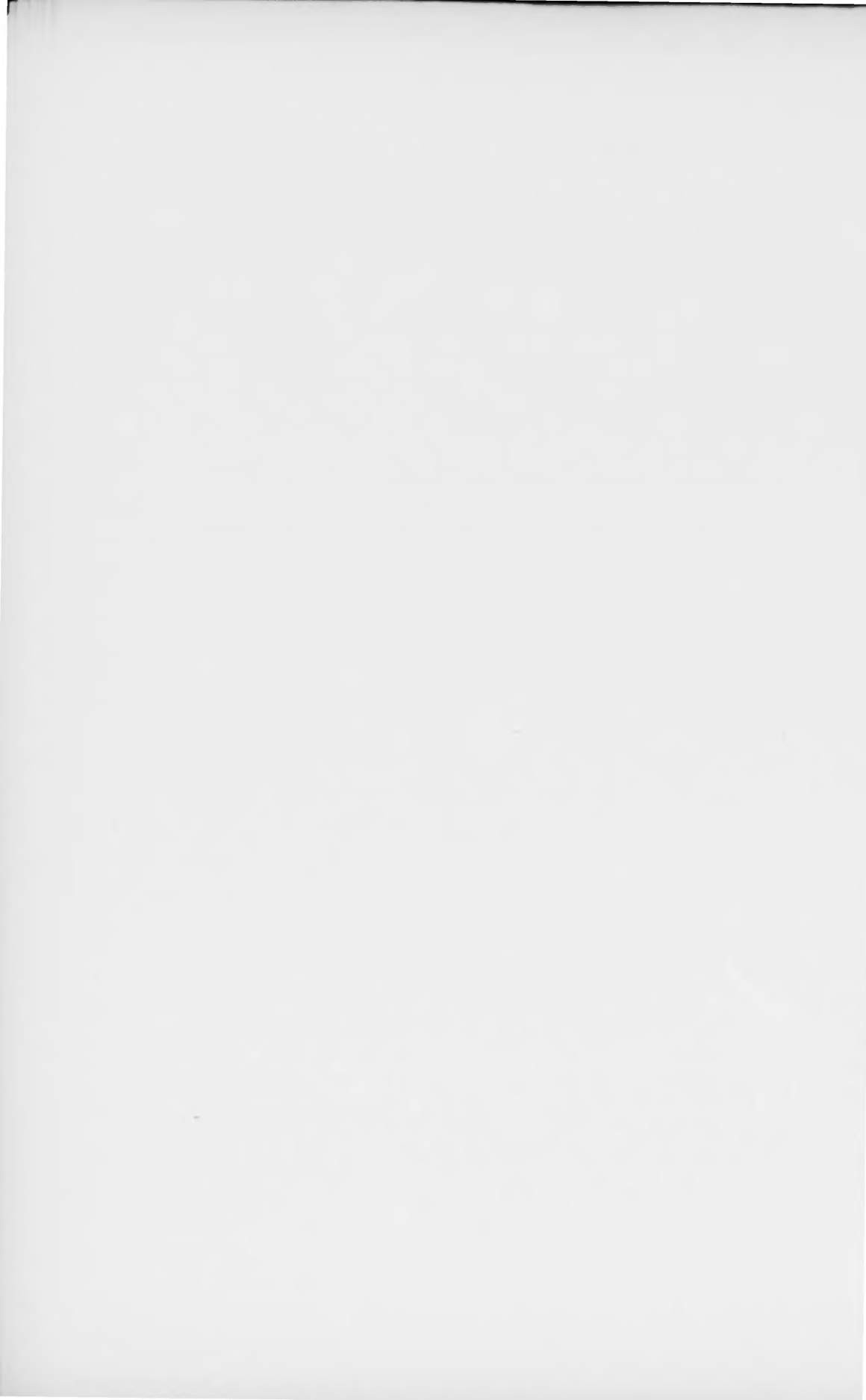
The District Court entered a one-sentence order dismissing Petitioner's Amended Complaint. Petitioner reasonably sought reconsideration. Upon reconsideration, the District Court imposed unspecified sanctions against Petitioner's counsel directing Petitioner's Counsel to pay Respondent's attorney fees in responding to Petitioner's Motion To Reconsider.

Petitioner respectfully appeals the dismissal of Petitioner's Amended Complaint and the imposition of sanctions against Petitioner's counsel. Petitioner respectfully submits this Brief in support of his appeal.



**REASONS RELIED UPON
FOR ALLOWANCE OF THE WRIT**

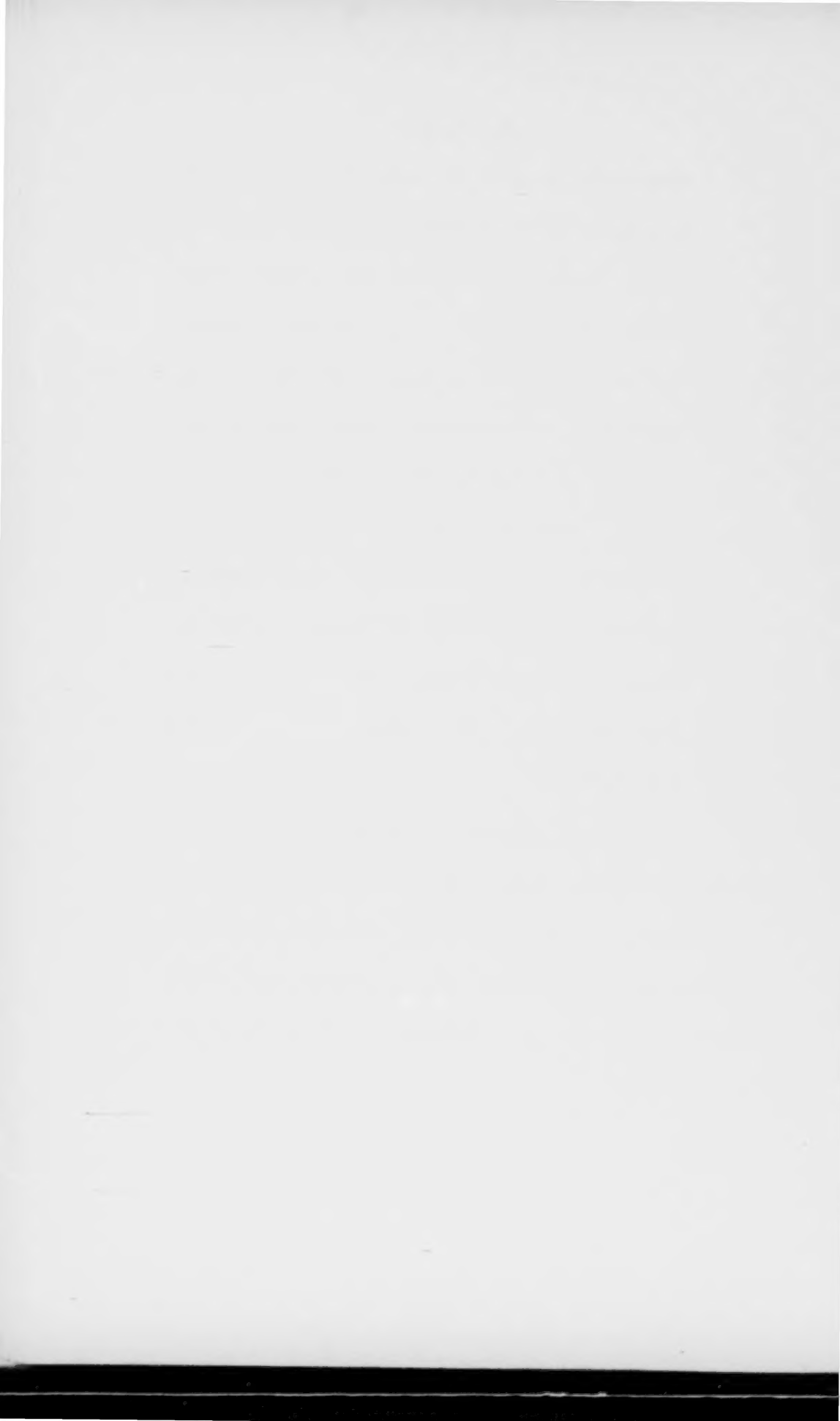
Review by certiorari is appropriate in the case at bar under Rule 17 (1) (a) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.



ARGUMENT

I. WHETHER OR NOT AN AMENDED COMPLAINT ALLEGES THAT A WHITE POLICE OFFICER TOLD WHITE FEMALES TO STAY AWAY FROM PLAINTIFF, A BLACK MALE, BECAUSE HE WAS A PIMP OUT OF RACIAL ANIMOSITY TOWARDS THE PLAINTIFF STATES A CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT IN THAT THE CONDUCT OF THE OFFICER VIOLATES THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT?

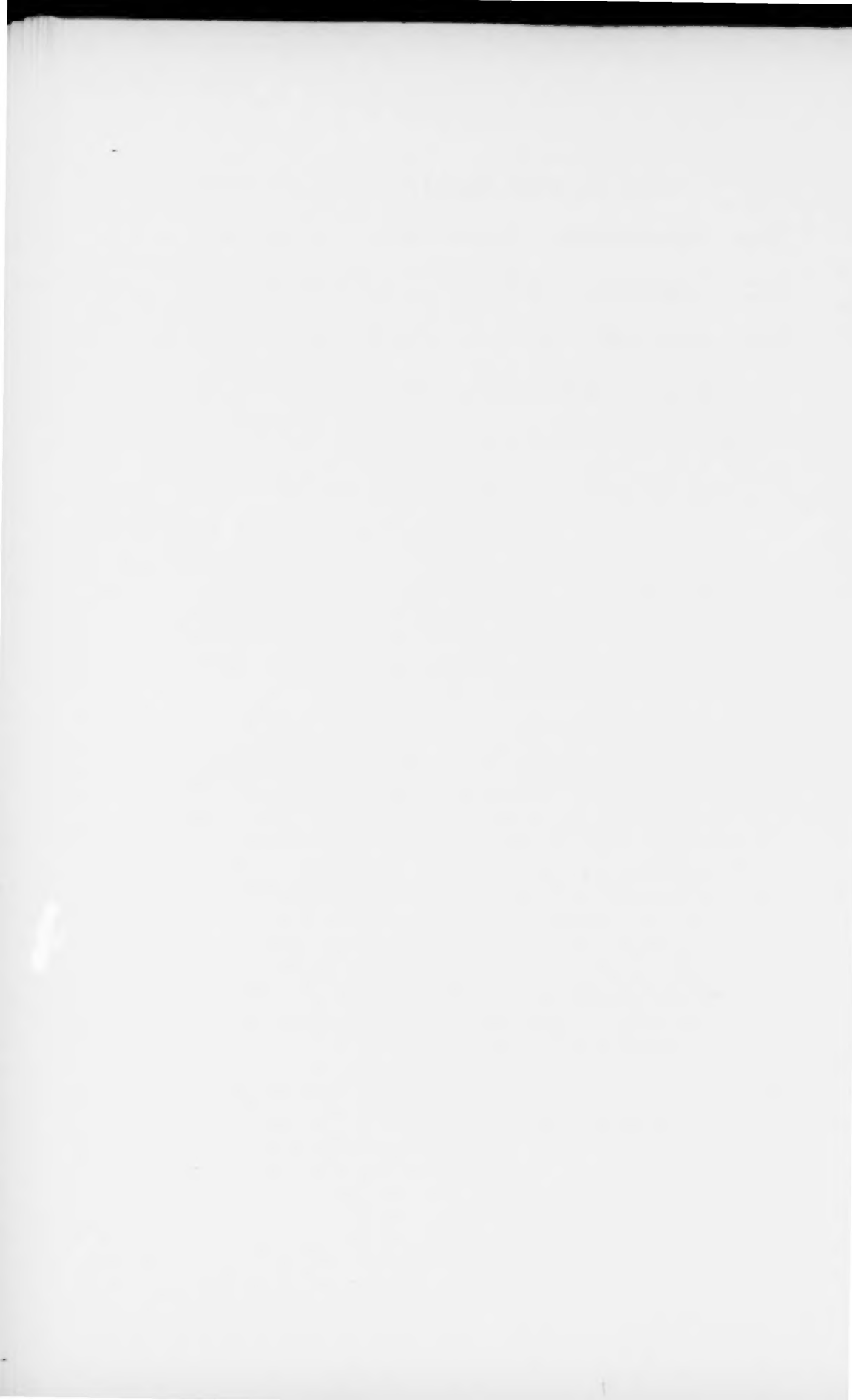
1. To state a claim under 42 U.S.C. §1983, Appellant must allege that Appellee, acting under color of law, deprived Appellant of a constitutional right. Gomez v. Toledo, 446 U.S. 635, 640 (1980).



2. Petitioner specifically alleged that Respondent, Schreiber, as an on-duty police officer, intentionally discriminated against black Petitioner in the enforcement of laws solely out of animus based upon race.

Petitioner alleged the following:

- "6. Plaintiff is a black adult male.
7. Prior to December 30, 1989, Defendant occasionally visited some friends who happened to be white females who work at commercial establishments of the City of Allentown.
8. On or about December 30, 1989, Defendant, Ronald Schreiber, while on duty as a police officer for the City of Allentown, approached a number of Plaintiff's white female friends while at work in commercial establishments in the City of Allentown, and maliciously reported to these friends to stay away from Plaintiff because Plaintiff was a 'pimp' and/or 'involved with prostitution activities.'
9. At the time and place aforesaid, Defendant Schreiber solely because of his race, intentionally and purposefully schemed to inhibit and block these white females from



engaging in or associating with black Plaintiff, and told them that 'Defendant and people would believe that they were prostitutes if they had any communication or association with Plaintiff.'

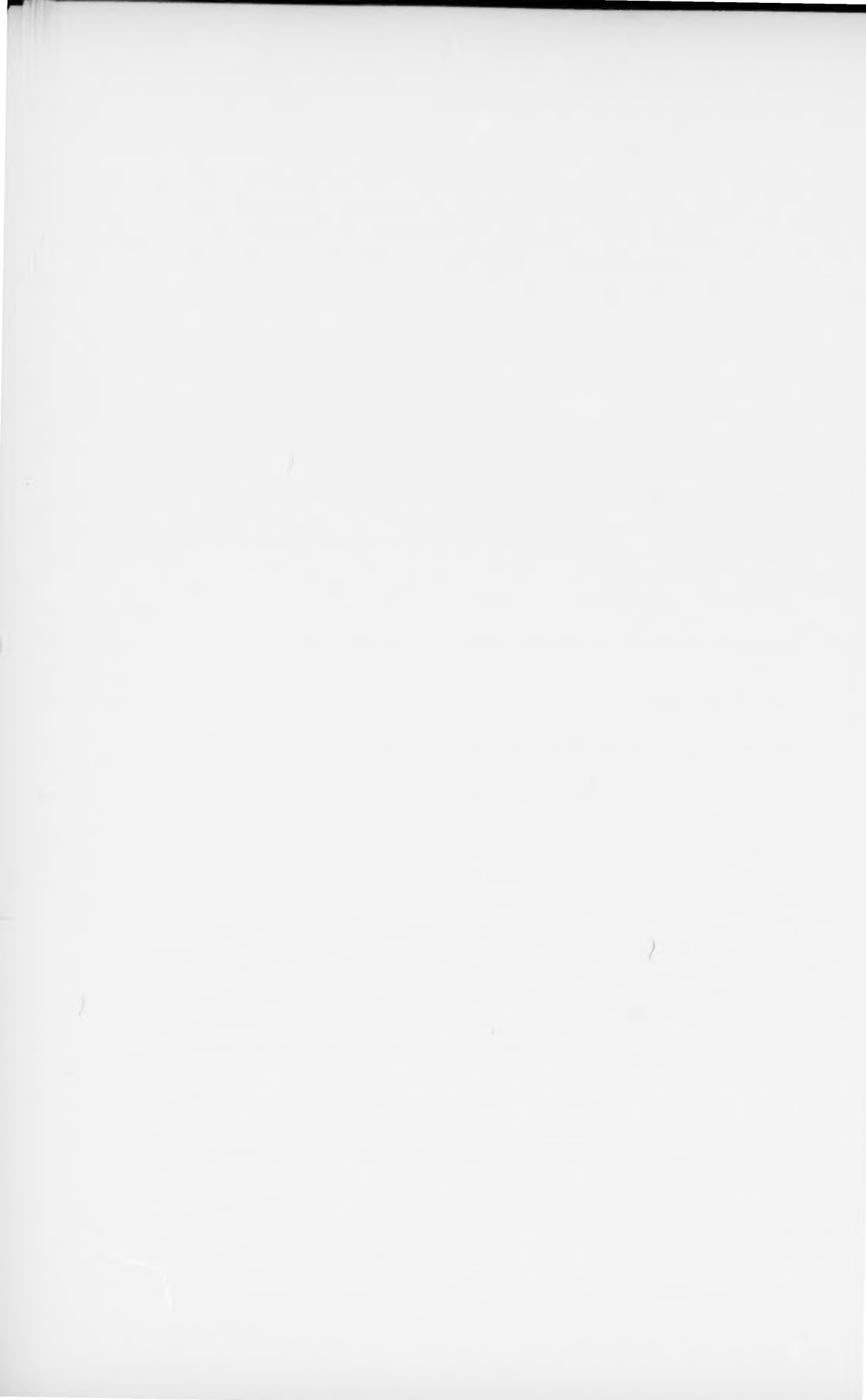
10. Plaintiff has never engaged in or been convicted of any offense relating to prostitution or pimping.
11. Defendant, Ronald Schreiberbeck's conduct as aforesaid, while on duty as a police officer and in the course of his employment whereby acting under lawful police authority from the City of Allentown, violated Plaintiff's constitutional right to free association and to equal protection of the laws solely out of animus based upon Plaintiff's race.
12. As a direct and proximate result of Defendant, Ronald Schreiberbeck's conduct, as aforesaid, Plaintiff's white female friends are so intimidated by Defendant's outrageous conduct that they are afraid to associate with Plaintiff or have ceased all communication and association with Plaintiff.
13. As a direct and proximate result of Defendant Schreiberbeck's outrageous conduct, Defendant has succeeded in implementing his invidiously discriminatory enforcement of the laws by acting under color of law to use intimidation and other

unlawful tactics to alienate, prohibit and inhibit Plaintiff, a black male, from lawful behavior visiting white female friends at commercial establishments while allowing similarly situated white males to visit white females at commercial establishments."

[Paragraphs 6 through 13 inclusive]

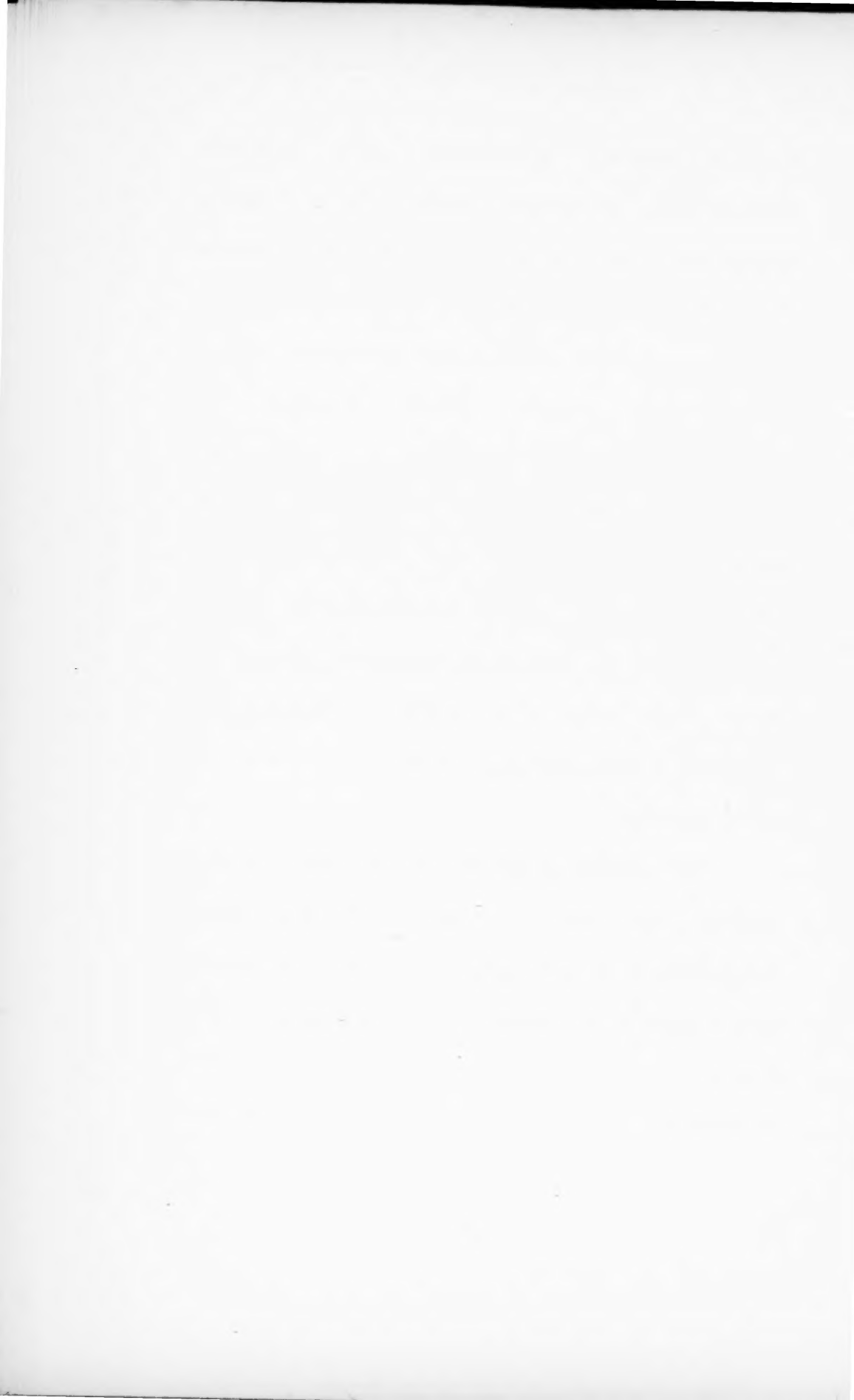
3. The Fourteenth Amendment of the United States Constitution prohibits the states from denying any person the equal protection of the laws. U. S. Constitution, Fourteenth Amendment. An on-duty police officer must enforce laws equally regardless of a person's race. U. S. Constitution, Fourteenth Amendment.

Petitioner alleged that, inter alia, "Defendant has succeeded in implementing his invidiously discriminatory enforcement of the laws by acting under color of law to use intimidation and other unlawful tactics



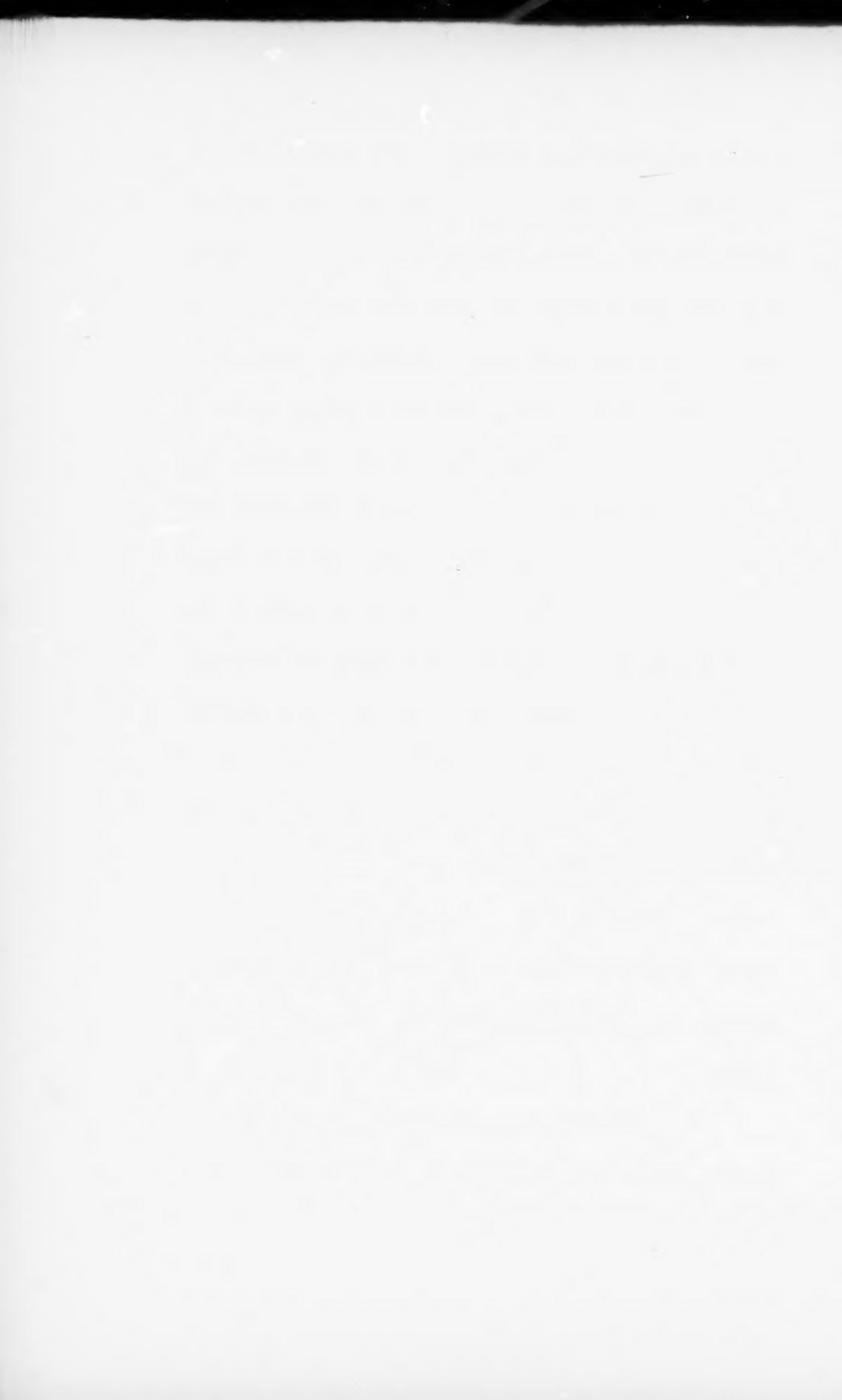
to alienate, prohibit and inhibit Plaintiff, a black male, from lawful behavior of visiting white female friends at commercial establishments which allowing similarly situated white males to visit while female at commercial establishments." (App. p. 40a). Petitioner alleged that Respondent failed to enforce laws equally based upon Appellant's race. Id. Bethel v. Pendoco Constro. Corp. 70 F.2d 168 (3d Cir 1978); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (3d Cir, 1989).

4. Petitioner stated a valid claim under 42 U.S.C. §1983 based upon Respondent's alleged discriminatory enforcement of laws, as aforesaid. The District Court did not discuss, but summarily dismissed, Appellant's §1983



equal protection claim. If Appellant's allegations fail to state an equal protection claim, then the Civil Rights Act of 1964 has no use or meaning. A white police officer lawfully may not enforce laws unequally depending upon a person's race. Id. 42 U.S.C. §1983, U. S. Constitution, Fourteenth Amendment; Glover v. City of New York, 401 F.Supp 632 (D.C. NY 1975) (where misconduct on part of public police officer, to extent that it infringes upon constitutionally protected rights, gives rise to civil rights action for deprivation of rights under color of state law). Hence, the order dismissing Petitioner's §1983 equal protection claim must be reversed. Gomez v. Toledo, 446 U. S. 635, 640 (1980).

5. Petitioner stated a valid §1983 claim against Defendant, City in Count



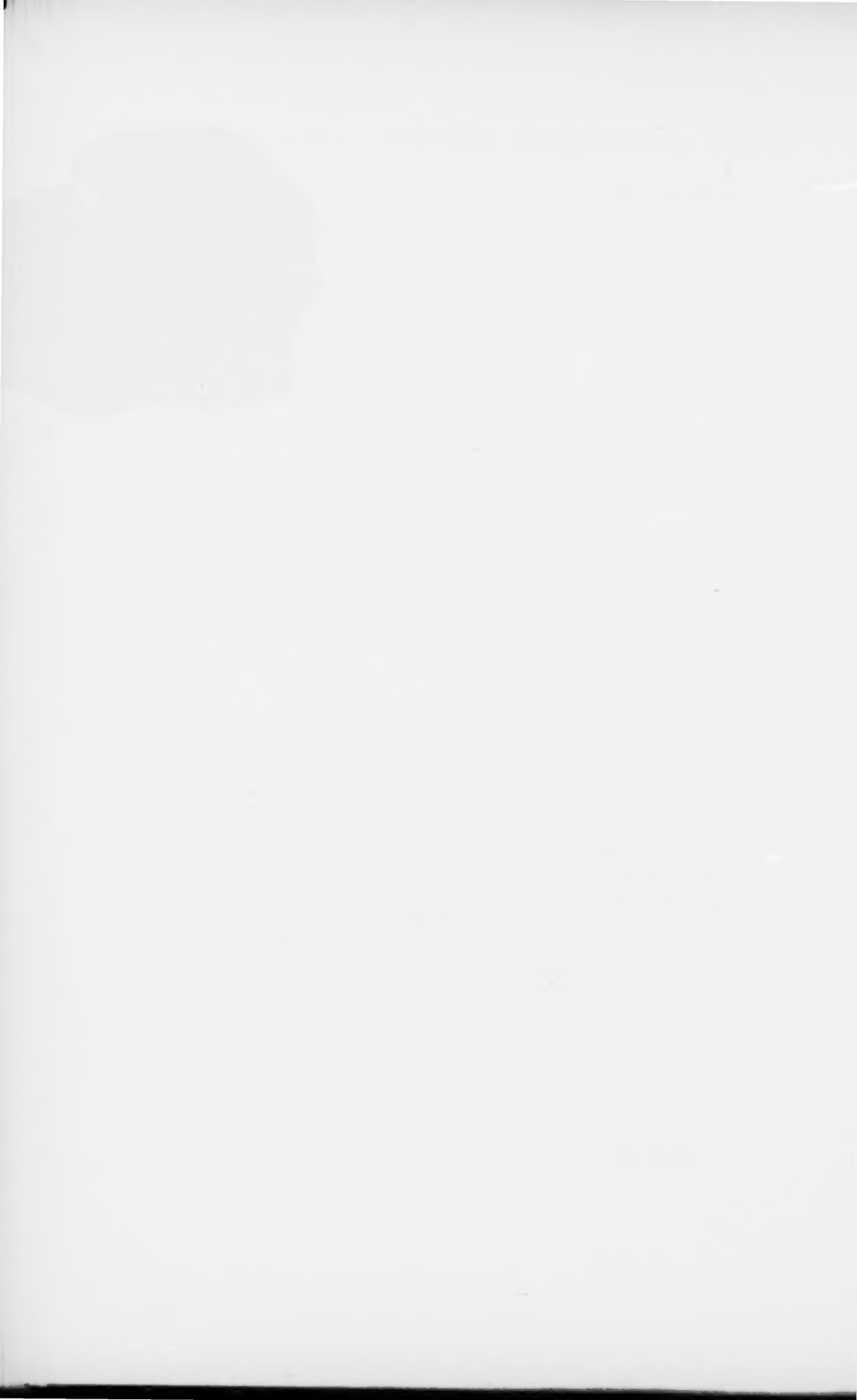
Two of Appellant's Amended Complaint.

To state a §1983 claim against a municipality, Petitioner must allege that a custom, policy, statement, ordinance, regulation, or decision officially adopted by Respondent municipality, proximately caused a deprivation of Petitioner's constitutional right. Monell v. Department of Social Services, 436 U. S. 658 (1978).

In Count Two, Petitioner alleged:

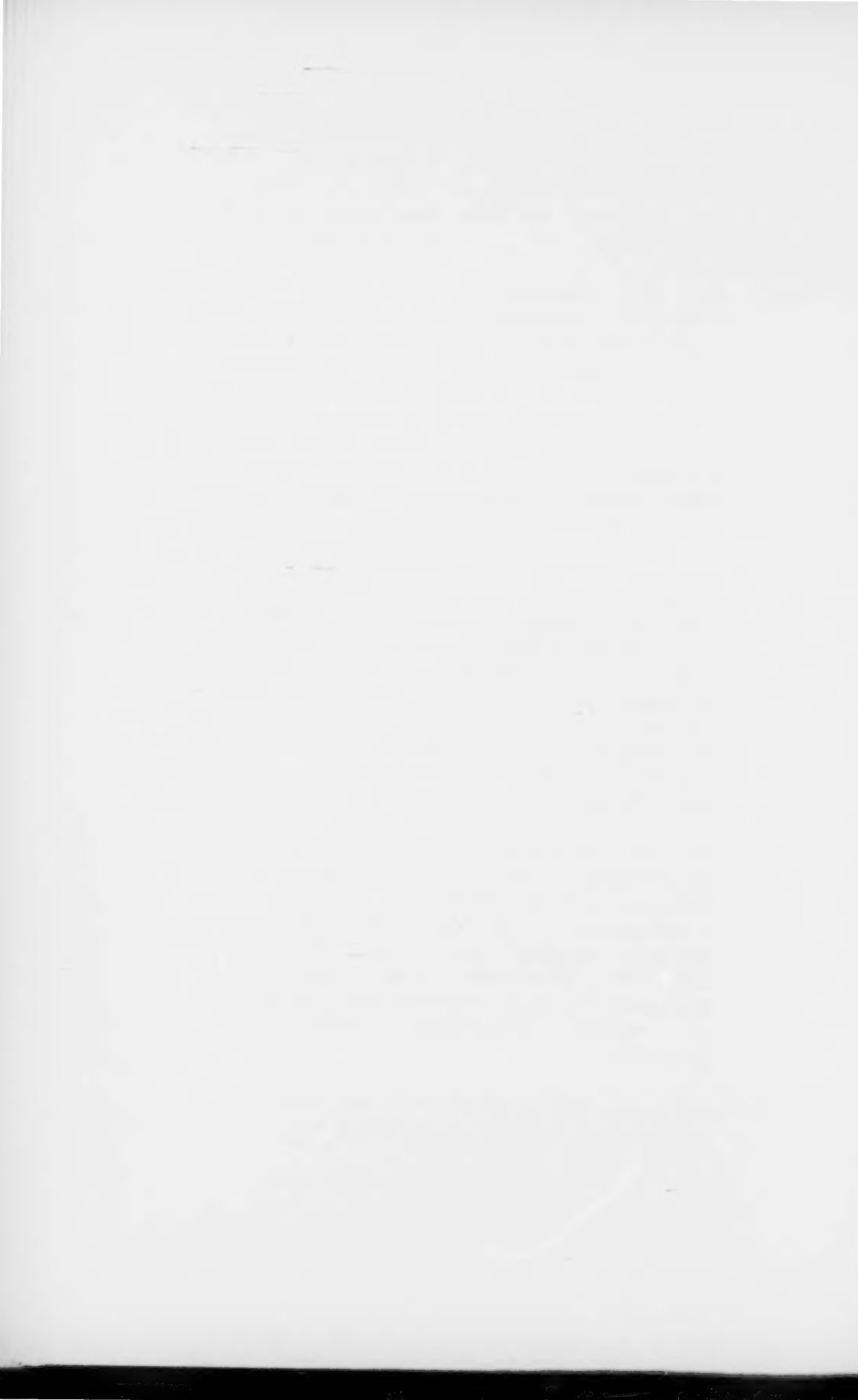
COUNT TWO

16. At all times herein relevant, Defendant City of Allentown, employed Police Officer Ronald Schreibeck, who acted pursuant to government policy implemented, approved, encouraged and/or acquiesced in by Defendant, City of Allentown, relative to the treatment and enforcement of laws against black persons.
17. At all times herein relevant, Defendant, City of Allentown, had actual or constructive knowledge that Policy Officer Ronald Schreibeck had racist propensities towards black persons and that



Police Officer Ronald Schreiber's racist propensities manifested themselves and affected his performance while on duty for and in the course of his employment with Defendant, City of Allentown.

18. At all times herein relevant, despite actual or constructive knowledge of Police Officer Ronald Schreiber's and other Defendant Police Officer's racist propensities toward black persons, defendant, City of Allentown, failed to discipline and/or reprimand the officers and affirmatively covered up the officers conduct resulting from their racist propensities, thus permitting, aiding, approving and/or acquiescing in Police Officer Ronald Schreiber's conduct resulting from his racist propensities toward black persons, constituting inter alia a deliberate indifference to the constitutional rights of Plaintiff and others.
19. As a natural, and direct or proximate result of Defendant, Ronald Schreiber's statement, as aforesaid, Plaintiff suffered severe mental pain and emotional anguish, distress, humiliation, and damages to his reputation in excess of Fifty Thousand (\$50,000.00) Dollars.
20. As a direct and proximate result of Defendant City's racist customs,



policies and/or deliberately indifferent actions and Defendant, Schreiber's aforesaid conduct in accordance therewith, Plaintiff suffered injuries, damages and constitutional deprivations set forth hereinbefore for which Plaintiff seeks compensation.

[Plaintiff's Amended Complaint, Paragraphs 16 - 20]

Petitioner clearly alleged the requisite elements of §1983 action against Respondent, City set forth in Monell and its progeny. The Order dismissing Count Two of Respondent's Amended Complaint ought to be reversed. Petitioner thus seeks review by this Honorable Court.

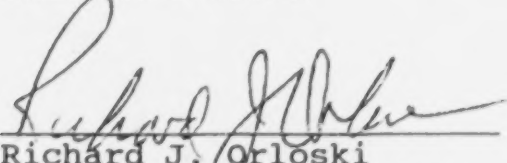
Petitioner clearly alleged Respondent police officer violated Appellant's right to equal protection of law as set forth above. Possibly, this case must be analyzed in terms of the Fourteenth Amendment.

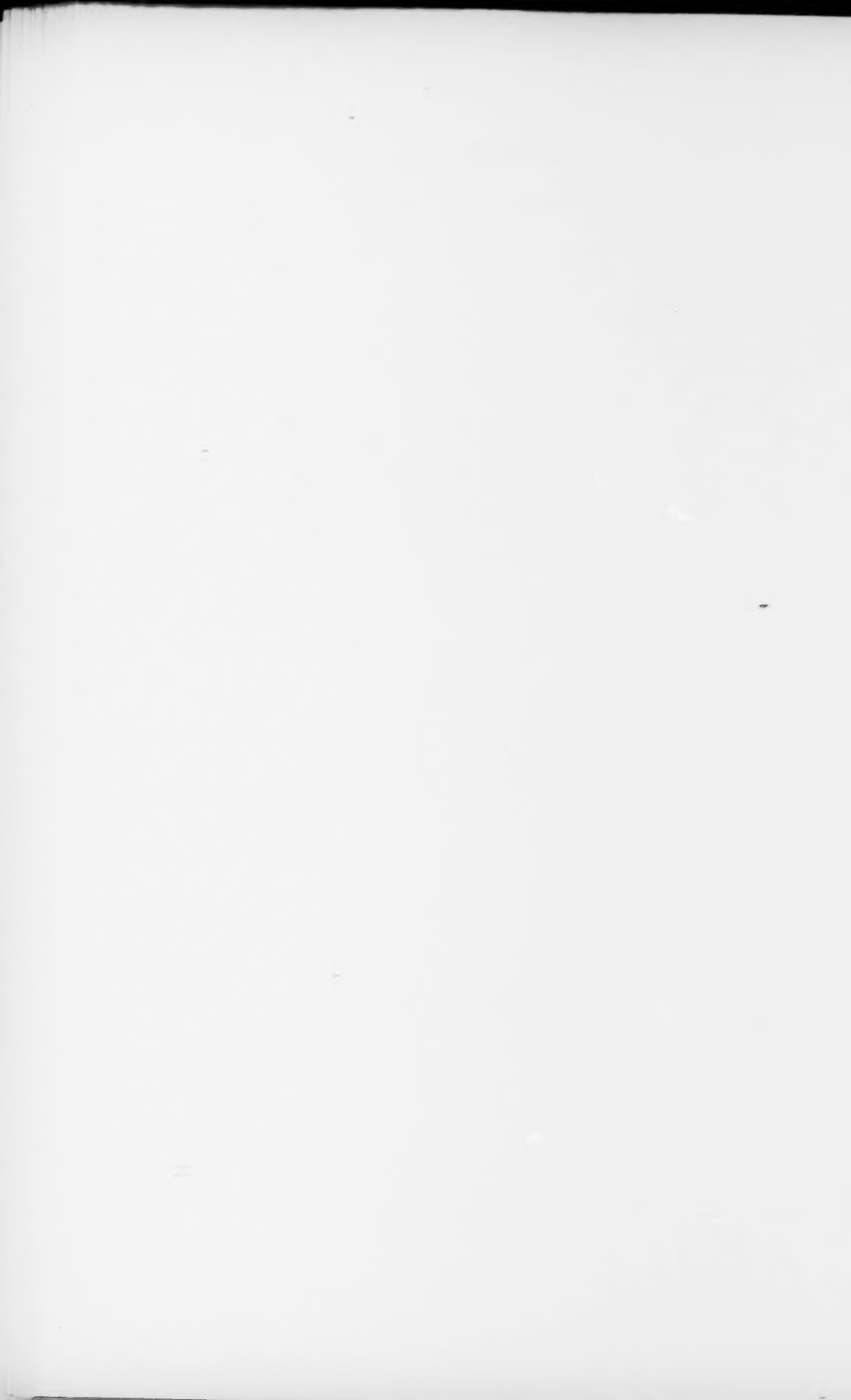


CONCLUSION

For the foregoing reasons, this
Petition for Writ of Certiorari ought to
be granted.

ORLOSKI & HINGA


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APPENDIX A - 3rd Circ Order and Opinion
- Cowen, Nygaard and Weis

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 91-1221

HENRY HOLLEY,
Appellant

v.

RONALD SCHREIBECK and
CITY OF ALLENTOWN

- On Appeal from the United States
District Court for the Eastern District
of Pennsylvania
(D. C. Civil No. 90-08012)
District Judge: Hon. Franklin S. Van
Antwerpen

Submitted Under Third Circuit Rule
12(6)
August 15, 1991

Before: COWEN NYGAARD AND WEIS,
Circuit Judges

JUDGMENT ORDER

After considering the contention



raised by appellant, it is ADJUDGED AND
ORDERED that the judgment of the
district court be and is hereby
affirmed. Costs taxes against
appellant.

ATTEST:

By the Court,

Sally Mrvos, Clerk

CIRCUIT JUDGE

Dated: _____



**APPENDIX B - Order and Opinion - U.S.
District Court - Hon. Franklin Van
Antwerpen**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

HENRY HOLLEY	:	
Plaintiff	:	CIVIL ACTION
	:	
vs.	:	No. 90-8012
	:	
RONALD SCHREIBECK,	:	JURY TRIAL
and CITY OF	:	DEMANDED
ALLENTOWN	:	

ORDER

AND NOW, this 25th day of
January, 1991, upon consideration of
Defendant's motion to dismiss, IT IS
ORDERED that Defendants' motion to
dismiss is hereby GRANTED and that
Plaintiff's Amended Complaint is



dismissed without leave to amend.¹

BY THE COURT:

Franklin S. Van Antwerpen, J.

¹No timely response has been filed and the Court deems this motion to be unopposed and uncontested under Local R. Civ. P.20 (c). Brief has been filed as expressly required. In addition the amended Complaint does no make out a Federal cause of Action.



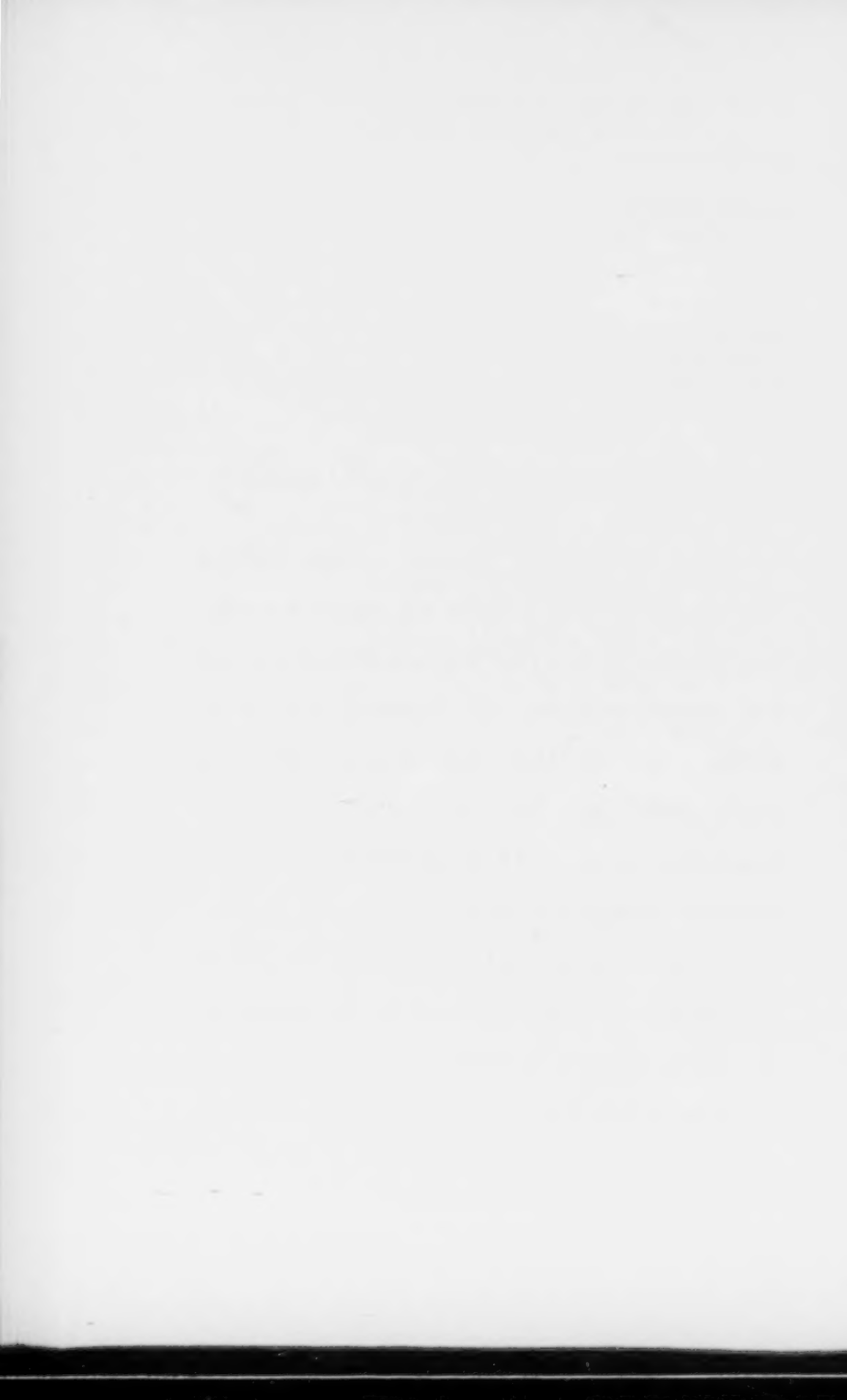
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

HENRY HOLLEY	:	
Plaintiff	:	CIVIL ACTION
	:	
vs.	:	No. 90-8012
	:	
RONALD SCHREIBECK,	:	JURY TRIAL
DEMANDED		
and CITY OF ALLENTOWN :		

OPINION AND ORDER

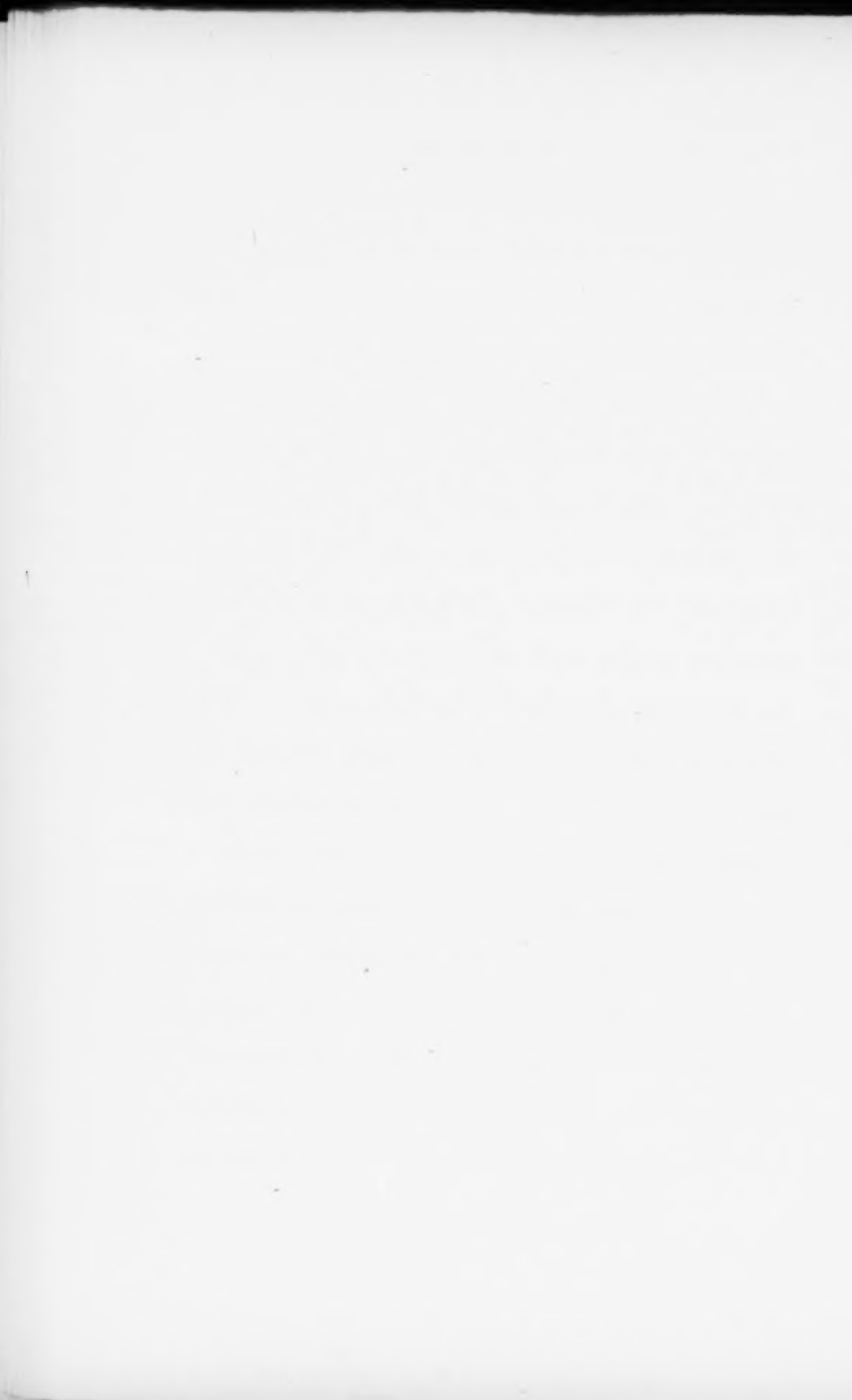
VAN ANTWERPEN, J.	MARCH 1,
1991	

This civil rights matter comes before the court on the motion of Henry Holley, the plaintiff, for reconsideration of the court's Order of January 25, 1991 which granted the defendants' motion, under Fed. R. Civ. P. 12(b) (6), and dismissed plaintiff's amended complaint without leave to amend. In so doing, the court expressly noted that no brief had been filed by plaintiff in response to defendants' motion as required by Eastern District of Pennsylvania Local



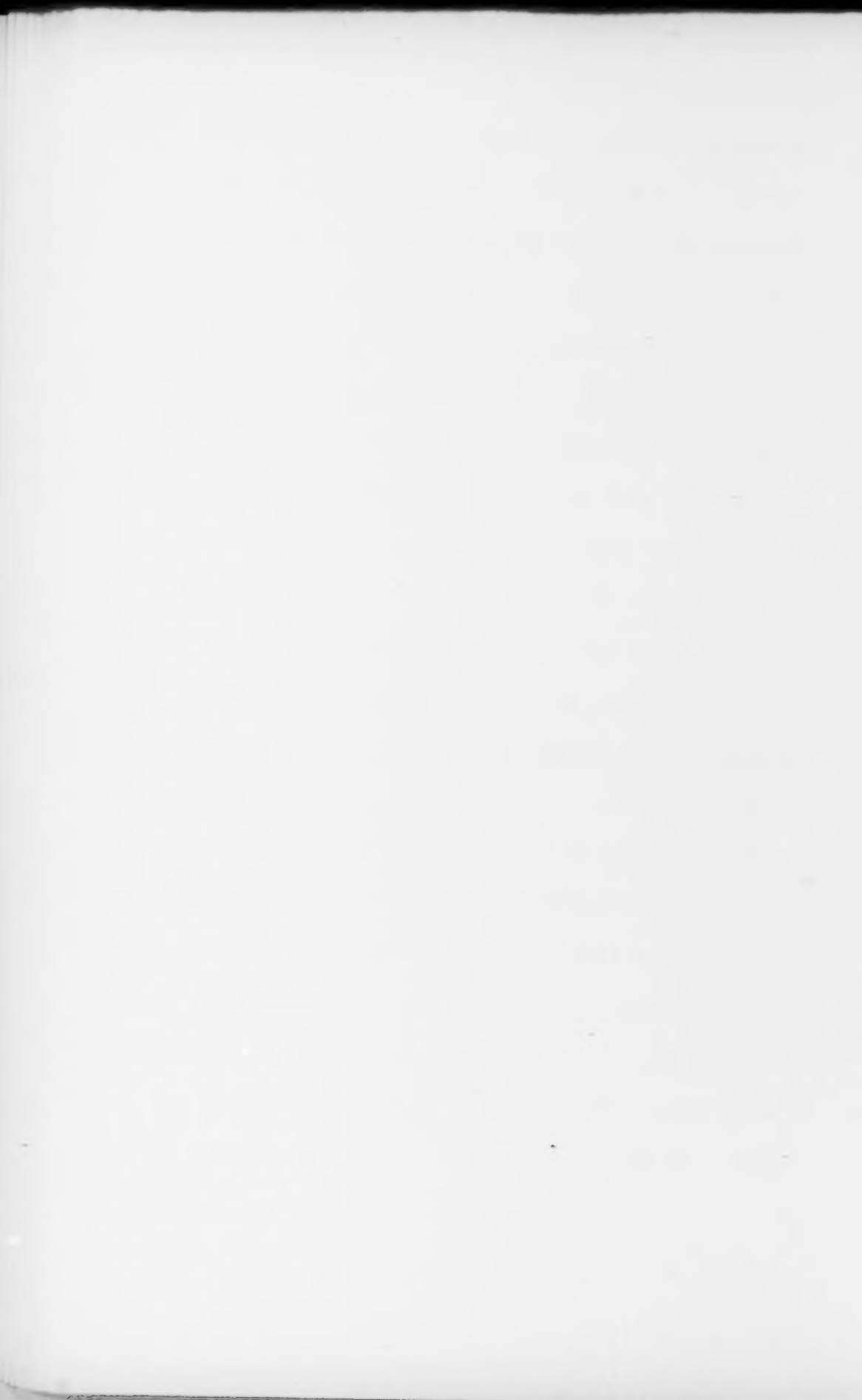
Rule of Civil Procedure 20(c). In addition, the court noted that plaintiff's amended complaint did not make out a federal cause of action.

The procedural history of this case may be outlined as follows. The plaintiff filed a complaint alleging federal civil rights violations under 42 U.S.C. §1981 on December 20, 1990. Thereafter, on January 8, 1991, defendants filed a motion, under Fed. R. Civ. P. 12(b) (6), to dismiss plaintiff's complaint. On January 18, 1991, plaintiff filed an amended complaint, which eliminated the claim under 42 U.S.C. §1981, but stated a claim under 42 U.S.C. §1983, alleging the same basic facts alleged in the original complaint with certain minor changes. Nothing other than an amended complaint was filed. The court granted the defendants' motion to dismiss



without leave to amend on January 25, 1991. Plaintiff filed a motion for reconsideration and brief on February 6, 1991 which is presently before the court. Since there were two grounds for the dismissal, we shall treat the procedural ground first.

In his motion for reconsideration, plaintiff correctly notes that he was entitled to file an amended complaint as a matter of course under Fed. R. Civ. P. 15(a). See, e.g., Kelley v. Delaware River Joint Commission, 187 F.2d 93 (3d Cir. 1951). Plaintiff also correctly notes in his motion for reconsideration that plaintiff's amended complaint superseded the original complaint which, thereafter, is treated as non-existent. Bullen v. De Bretteville, 239 F.2d 824 (9th Cir. 1956), cert. denied, 353 U.S. 947 (1957). The problem with



plaintiff's actions is that, as expressly noted in the court's prior order, no brief was ever filed together with the amended complaint. Local Rule 20(c) provides, as follows:

"Every motion not certified as uncontested shall be accompanied by a brief. A brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion or unless the court directs otherwise any party opposing the motion shall serve a brief in opposition together with such answer or other response as may be appropriate within 10 days after service of the motion and supporting brief . . .

[Id. (emphasis added)]

We do not dispute that the amended complaint qualified under this local rule as a "response." Our difficulty was and is with the unexplained failure of plaintiff's counsel to file a brief along with the response. A brief would



have been particularly helpful in responding to defendants' arguments because, although plaintiff chose to change the legal characterization of the action in an amended complaint, the underlying facts remained basically the same.

This is not the first case in which this court has had this kind of difficulty with this particular plaintiff's counsel. Plaintiff's counsel is obliged to abide by the court's Local Rules of Civil Procedure, not by the rules as he envisions them. Since counsel did file an amended complaint as a response under Local Rule 20(c), we will not treat the prior motion to dismiss as unopposed or uncontested. We will, however, impose appropriate sanctions on plaintiff's counsel for the failure to file a brief



and direct that plaintiff's counsel pay defendants' counsel fees in responding to this motion to reconsider.

This brings us to the second ground for our previous dismissal, which was the perceived failure of even the amended complaint to make out a federal cause of action. Fed. R. Civ. P. 12(b) (6) allows a court to dismiss "for failure to state a claim upon which relief can be granted." The criteria which a court must use in deciding a motion to dismiss under Fed. R. Civ. P. 12(b) (6) are clear:

"In reviewing a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b) (6), all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985); Rogin v. Bensalem Township, 616 F.2d 680, 685 (3d Cir. 1980), cert.

denied, 450 U.S. 1029 (1981).
Sturm v. Clark, 835 F.2d 1009, 1011
(3d Cir. 1987).

The Third Circuit has also stated:

"In deciding a Rule 12(b) (6) motion, factual allegations of the complaint are to be accepted as true and the complaint should be dismissed only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Reasonable factual inferences will be drawn to aid the pleader. Amalgamated Transit Union v. Byrne, 568 F.2d 1025, 1031 (3d Cir. 1977) (in banc) (Aldisert, J., dissenting); Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 395 F.2d 420 (3d Cir. 1968).

D.P. Enterprises, Inc. v. Bucks County Community College, 7215 F.2d 943, 944 (3d Cir. 1984).

We do not grant a motion to dismiss under Fed. R. Civ. P. 12(b) (6) lightly because a dismissal denies the parties a full trial on the merits. At the same time, we do not see how the simple fact situation alleged could become more favorable for plaintiff with in-depth discovery, another amended complaint or



live testimony in court. In short, taking the basic factual allegations as true, the facts are as good for plaintiff as they are going to get, and we shall review these facts under the foregoing legal standards.

Taken at their best, the allegations of plaintiff's amended complaint are that the defendant "occasionally visited some friend (sic) who happened to be white females," (Complaint, paragraph 7); and that on one occasion, namely on or about December 30, 1989, the defendant Robert Schreibeck, while on duty as a police officer for the City of Allentown and while acting as a policeman, approached a number of plaintiff's "white female friends" while they were working in commercial establishments in the City of Allentown, and advised these individuals



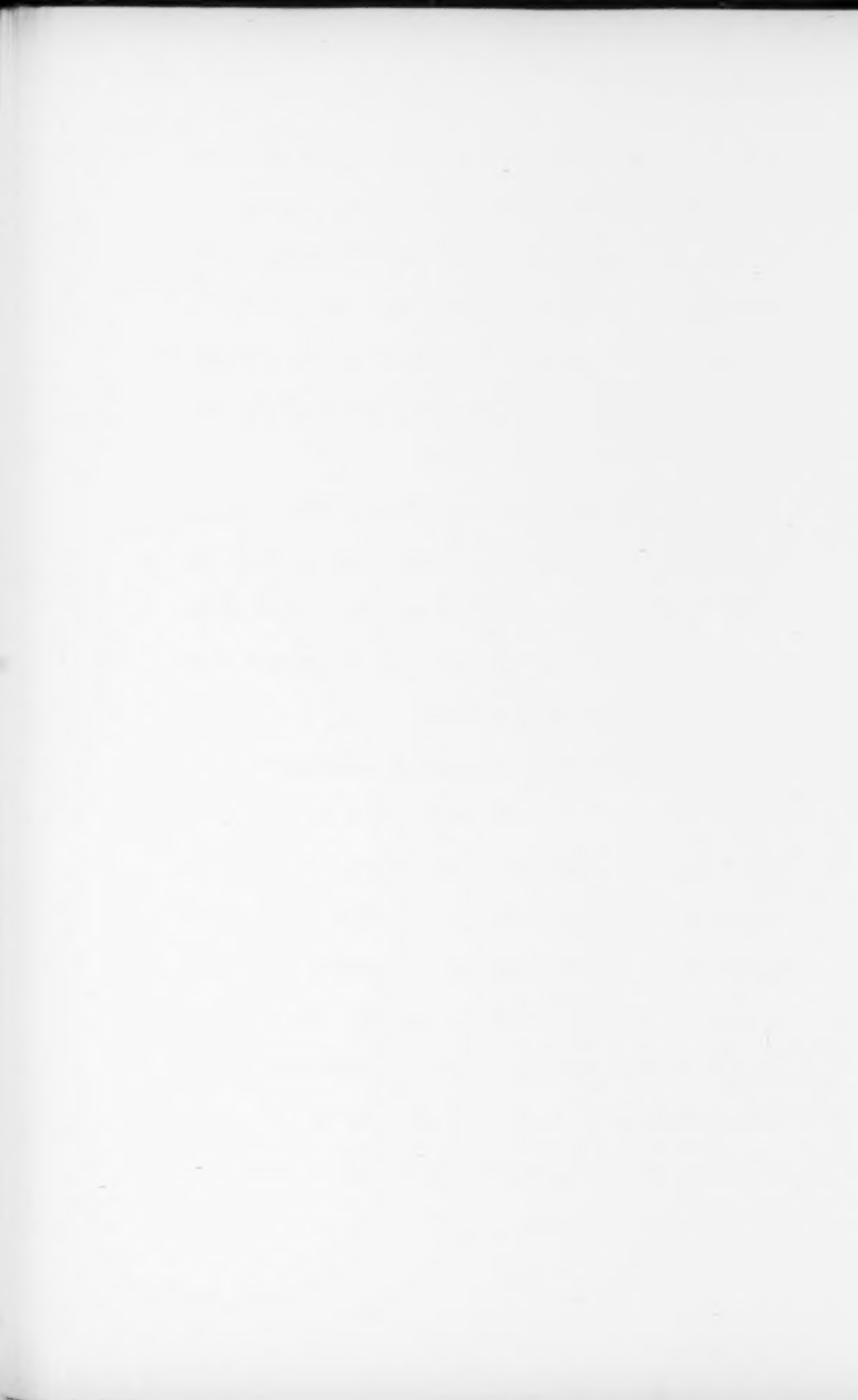
to "stay away from plaintiff because plaintiff was a pimp and/or involved with prostitution activities." (Complaint, paragraph 8). Plaintiff further alleges that defendant did this solely because of the race of the plaintiff and to prevent these females from "engaging in or associating with black plaintiff." (Complaint, paragraph 9). There are no allegations that anyone was taken into custody or even directly threatened with arrest. Plaintiff claims that he is damaged because "as a direct and proximate result of the defendant Robert Schreiber's conduct," plaintiff is "alienated, prohibited and inhibited from visiting white female friends at commercial establishments and that they are afraid to association (sic) with plaintiff." (Complaint, paragraphs 11,



12). Plaintiff's claims against the City of Allentown are based upon an alleged failure to discipline and reprimand the officer, as well as a cover-up of his allegedly known racist propensities. (Complaint, paragraph 18, 19).

We do not believe that the facts alleged rise to a violation under 42 U.S.C. §1983, nor do we believe there is a violation of plaintiff's right to equal protection of law.

In Roberts v. United States Jaycees, 468 U.S. 609, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984), the United States Supreme Court upheld a Minnesota state statute requiring local Jaycee chapters to admit women. The court noted only two different sorts of "freedom of association" that are protected by the United States Constitution. One is



based upon the First Amendment and includes freedom of speech, as well as the right of assembly and petition for redress. The other is based upon "certain intimate human relationship which must be secured against undue intrusion by the state because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."- Roberts, 468 U.S. at 618.

In Dallas v. Stanglin, 490 U.S. 19, 109 S. Ct. 1591, 104 L.Ed.2d 18 (1989), the Supreme Court upheld a city ordinance which restricted admission to certain dance halls to patrons between the ages of fourteen and eighteen. The court held that the city ordinance did not violate the patrons' First Amendment rights of free association or equal protection of laws under the United



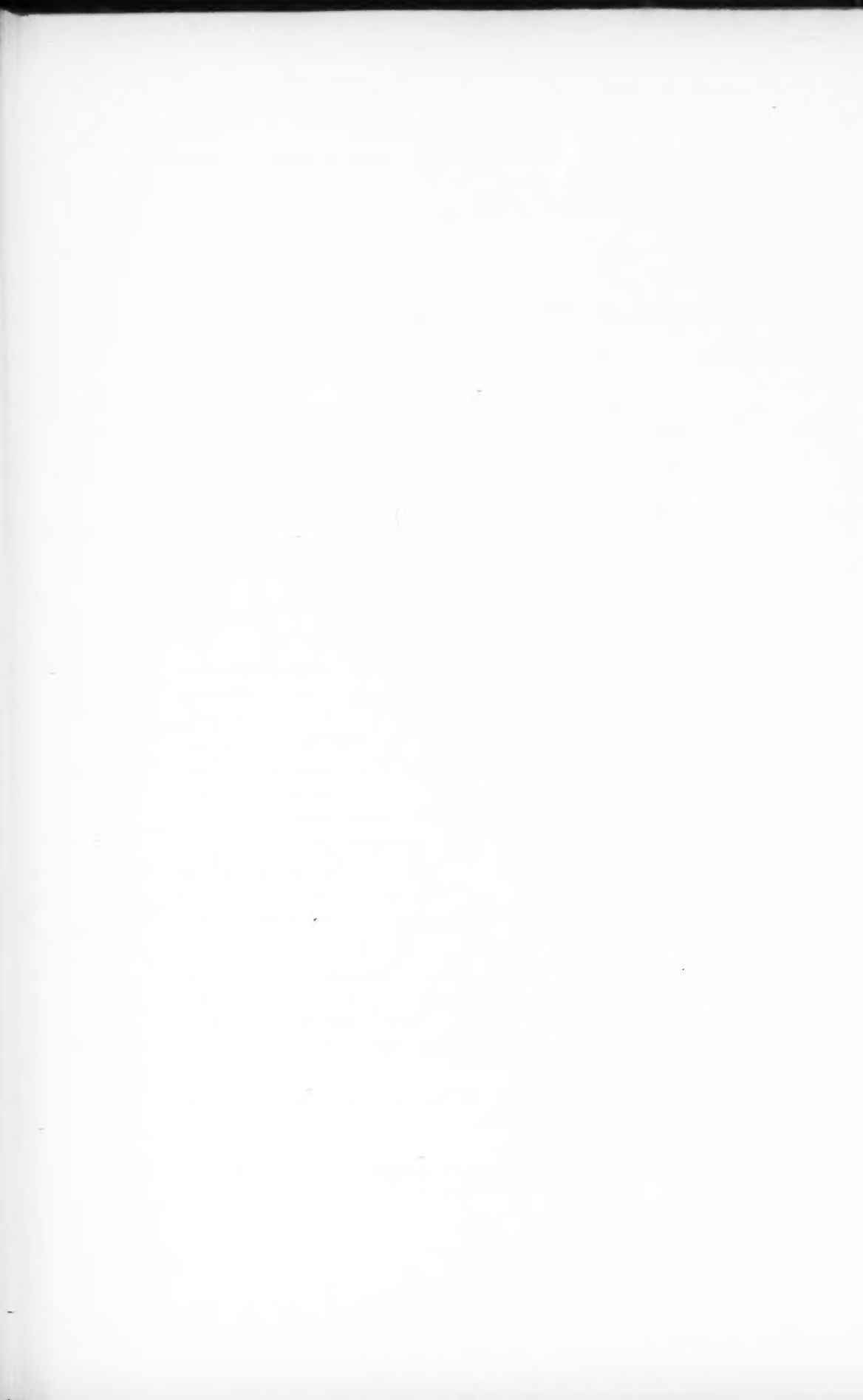
States Constitution. In so holding, the court further explained Roberts and stated:

The cases cited in Roberts recognized that:

"...freedom of speech" means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons - coming together to engage in recreational dancing - is not protected by the First Amendment. Thus this activity qualifies neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in Roberts. Unlike the Court of Appeals, we do not think the Constitution recognizes a generalized right of social association that includes chance encounters in dance halls."

[Stanglin, 490 U.S. at 25 (emphasis added)]

In Plaintiff's amended complaint, it is



alleged that Ronald Schreibeck's comments have prohibited and inhibited plaintiff from visiting white female friends at commercial establishments. This is precisely the type of conduct which the Supreme Court in Stanglin held was outside the scope of First Amendment protection. For this reason, we concluded in our prior order that plaintiff's amended complaint failed to make out a viable cause of action for violation of the right of free association.

We note other authority which supports our position. In Swank v. Smart, 898 F.2d 1247 (7th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 147 (1990), the court was faced with the discharge of a police officer which was based in part upon an off-duty motorcycle ride with a seventeen year-



old female college student. The court stated that this type of encounter did not implicate First Amendment rights of intimate association:

"The purpose of the free-speech clause and of its judge-made corollary the right of association is to protect the market in ideas, Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting), broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions--scientific, political, or aesthetic--to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat between two person or otherwise confined to a small social group in unrelated, or largely so, to that marketplace, and is not protected. Such conversation is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment."

[898 F.2d at 1250]

In IDK, Inc. v. County of Clark, 836 F.2d 1185 (9th Cir. 1988), the court

upheld a county regulation concerning licensing and control of escort services and their employees. The court found the regulation constitutional on its face and states that escort service associations were not the type of intimate "family and similar highly personal relationships" protected by the Constitution. Id. at 1193. The court went on to note that escort service associations were not protected, as a part of free speech, under the First Amendment.

Mere words standing alone will not support a civil rights action. As our former chief judge noted in Johnson v. Hackett, 284 F.Supp. 933, 940 (E.D. Pa. 1968):

"The private right to enjoy integrity of reputation (the law of libel and slander) and the public right to tranquility (laws dealing with breach of the peace) are

matters of state concern. Beauharnais v. People of State of Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952). Defining and punishing the use in public place of words likely to cause a breach of the peace is a matter "within the domain of state power." Chaplinsky v. State of New Hampshire, 315 U.S. 568, 573, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942). Common law slander by a public official is not within the ambit of civil rights protected under the Constitution. Hopkins v. Wasson, 227 F.Supp. 278 (E.D. Tenn.S.D. 1962)."

Plaintiff's action is nothing more than a defamation suit in disguise and it belongs in the state courts.¹ As a matter of common sense, we do not believe that the alleged result of a single remark such as that allegedly made by the officer in this case rises to a level which requires constitutional protection. Were we to so hold,

¹We express no opinion whether or not such a suit in the state court would be barred by a privilege or governmental immunity. See 42 Pa. C.S.A. §8541.



virtually ever public arrest in which the policy accuse someone of committing a crime would give rise to a federal civil rights action.

An appropriate order follows.



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY HOLLEY	:	
Plaintiff	:	CIVIL ACTION
	:	
vs.	:	No. 90-8012
	:	
RONALD SCHREIBECK,	:	JURY TRIAL
DEMANDED	:	
and CITY OF ALLENTOWN :	:	

ORDER

AND NOW, this first day of March, 1991, plaintiff's Motion for Reconsideration filed February 6, 1991 is hereby DENIED. Accordingly, the court's prior Order of January 25, 1991 dismissing plaintiff's amended complaint with prejudice stands. Defense counsel shall file, within eleven (11) days of the date of this Order, An Affidavit setting forth counsel fees and costs expended in the argument of plaintiff's motion for reconsideration. If no exceptions to said Affidavit are filed within eleven (11) days of the filing of the



Affidavit, plaintiff's counsel shall pay said counsel fees and costs within twenty (20) days of filing of said Affidavit.

BY THE COURT

Franklin S. Van Antwerpen, J.



APPENDIX C - 42 U.S.C. 1983

Civil action for deprivation of rights

Every person who, under color of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**APPENDIX D - U.S. Constitution -
Fourteenth Amendment**

**FOURTEENTH AMENDMENT TO THE
UNITED STATES CONSTITUTION**

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.